

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

GERMAINE COLE-EL, a/k/a  
JERMAINE COLE-EL,

Defendant-Appellant.

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UNPUBLISHED

March 20, 2003

No. 234456

Kent Circuit Court

LC No. 01-000371-FH

Before: Schuette, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of uttering and publishing counterfeit bills, MCL 750.253. The trial court sentenced defendant to imprisonment for 2 to 15 years. We affirm.

Defendant first argues that numerous instances of prosecutorial misconduct deprived him of a fair trial. Issues of prosecutorial misconduct are decided on a case-by-case basis. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *Id.* This Court generally reviews de novo a claim of prosecutorial misconduct; however, the trial court's factual findings are reviewed for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001), lv den 465 Mich 916 (2001).

Defendant contends that the prosecutor introduced a transaction sheet in violation of the trial court's discovery order and that the trial court abused its discretion in admitting the transaction sheet into evidence. The trial court's discovery order specifically "implement[ed] all provisions applicable to criminal cases." MCR 6.201(A)(5) requires a party on request to provide any document or other paper that the party intends to introduce at trial. Defendant's demand for discovery included a specific request for inspection of any physical evidence. The trial court agreed that the prosecutor improperly failed to provide defendant with a copy of the transaction sheet until the middle of the trial, but nevertheless, admitted the transaction sheet into evidence because its admission was cumulative to other evidence and not prejudicial. The trial court's findings in this regard are not clearly erroneous, and we conclude that the defendant was not denied a fair trial by the admission of the evidence.

Defendant next argues that the prosecutor violated the discovery order by failing to provide to defendant in advance of trial a copy of one of the two videotapes introduced in

evidence, and that the trial court abused its discretion in admitting the videotape into evidence. However, defense counsel affirmatively stated on the record that he did not object to the admission of either of the videotapes, effecting a waiver of any objection to the admission of the videotapes or any claim that the prosecutor engaged in misconduct. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000). Defendant's waiver has extinguished any error, and there is no "error" for this Court to review. *Id.*, 219.

Defendant next argues that the prosecutor deprived him of a fair trial by calling Shonda Smith as a witness when she was not listed as a witness in violation of MCL 767.40a, and that the trial court abused its discretion in permitting Smith to testify notwithstanding the prosecutor's violation of MCL 767.40a. This Court reviews a trial court's decision to allow an endorsement or deletion of a witness from a witness list for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995); *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992). Under MCL 767.40a(4), the prosecutor is permitted to "add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." A prosecutor's failure to comply with MCL 767.40a does not mandate automatic reversal. See *People v Williams*, 188 Mich App 54, 58-59; 469 NW2d 4 (1991). Moreover, a trial court must exercise discretion in fashioning a remedy for noncompliance with a discovery statute. *Id.* An abuse of discretion will not be found unless the defendant can show that he was prejudiced by the prosecutor's failure to comply with the statute. *Id.*, 59.

We conclude that under the facts and circumstances of this case, defendant was not prejudiced by Smith's testimony. Defendant conceded that before trial he had received a copy of Smith's statement as well as a copy of the police report, which contained Smith's name. In addition, at the time of the offense, Smith was defendant's girlfriend and was working at the cash register where defendant presented the counterfeit \$100 bills as payment for merchandise. Finally, contrary to defendant's argument, the prosecutor did state in his opening argument that Smith might be a witness at trial. Under these circumstances, although the prosecutor did not comply with MCL 767.40a, defendant was not prejudiced by the trial court's decision to allow Smith to testify, and the prosecutor's noncompliance with MCL 767.40a did not deprive defendant of a fair trial. Accordingly, there was no prosecutorial misconduct, and the trial court did not abuse its discretion in allowing Smith to testify.

Defendant next argues that the trial court abused its discretion in admitting into evidence a form in which defendant allegedly acknowledged taking JC Penney property without payment. Contrary to defendant's claim, the acknowledgement form was not actually admitted into evidence. Rather, Timothy Belden, a loss prevention manager for JC Penney, read part of the form into evidence and testified that defendant acknowledged the contents of the form. According to Belden's testimony, the acknowledgement form stated, "I . . . freely admit without threat or promise of any kind that on this date I took from the possession of the company without making payment, without permission of the company, and with the intent to take for my own use or disposition without payment the following property of the company." Belden further testified that defendant could not sign the form because he was handcuffed. However, according to Belden, defendant "acknowledged" the document and "looked like he understood."

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999). In this case, the trial court did not

abuse its discretion in permitting Belden to read a portion of the acknowledgement form because the contents of the form, together with Belden's testimony regarding defendant's response to the form, was relevant under MRE 401 since any evidence showing that defendant may have admitted or acknowledged that he took items from JC Penney without paying would be relevant to proving the elements of uttering and publishing. Accordingly, the trial court did not abuse its discretion in admitting the challenged testimony.

Defendant also argues that the evidence was insufficient to sustain his conviction of uttering and publishing counterfeit bills. The elements of uttering and publishing are: (1) knowledge on the part of the defendant that the instrument was false; (2) intent to defraud, and (3) presentation of the forged instrument for payment. MCL 750.253; *People v Shively*, 230 Mich App 626, 631; 584 NW2d 740 (1998). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of an offense. *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995). An actor's intent may be inferred from the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

There was sufficient evidence to satisfy the elements of uttering and publishing. Officer Glen Culbert and Detective David Peuler both testified that defendant told them that he knew that the \$100 bills were counterfeit. Therefore, there was sufficient evidence that defendant knew the bills were false. In addition, there was sufficient evidence that defendant presented the \$100 bills for payment. The videotape that was played at trial showed defendant paying for his purchases, and Shonda Smith testified that defendant paid for the merchandise with three \$100 bills. According to testimony elicited at trial, the loss prevention supervisor removed the \$100 bills from the cash register. United States Secret Service special agent Robert Myers testified that the \$100 bills were counterfeit. Under these circumstances, there was sufficient evidence that defendant presented the three counterfeit \$100 bills for payment.

Finally, there was sufficient evidence that defendant intended to defraud JC Penney. Evidence of elements of a crime such as intent to defraud is rarely clear and convincing and often such a crime can only be proven with circumstantial evidence. *People v Mask*, 68 Mich App 104, 108; 241 NW2d 777 (1976). The evidence that defendant told Officer Culbert and Detective Peuler that he knew that the \$100 bills were counterfeit, coupled with the videotape showing defendant presenting the counterfeit \$100 bills for payment for merchandise, permits the inference that defendant possessed the requisite intent to defraud. Accordingly, a rational trier of fact could have found that there was sufficient evidence to satisfy the elements of uttering and publishing.

Affirmed.

/s/ Bill Schuette  
/s/ David H. Sawyer  
/s/ Kurtis T. Wilder